

ROGUE RIVER OUTFITTERS ASSOCIATION

IBLA 83-806

Decided October 10, 1984

Appeal from decision by the Acting State Director, Oregon Bureau of Land Management, rejecting application for refund of user fees.

Affirmed.

1. Administrative Authority: Laches -- Estoppel -- Laches

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.

2. Federal Land Policy and Management Act of 1976: Permits -- Public Lands: Special Use Permits -- Special Use Permits

Collection of user fee pursuant to 43 CFR 8372.4 is proper where the commercial user was obligated to pay a fee for river rafting trips conducted in a special area under duly promulgated Departmental regulations even though Bureau of Land Management officials have not collected a user fee from noncommercial users of the same area.

APPEARANCES: David L. Jensen, Esq., Eugene, Oregon, for appellant; Eugene A. Briggs, Esq., Office of the Solicitor, United States Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

This appeal involves conflicting interpretations of a prior decision of this Board in Rogue River Outfitters Association, 63 IBLA 373 (1982), which appellant claims has not been given practical application in later decisions by the Bureau of Land Management's (BLM) Oregon State Office required by law. In Rogue River Outfitters Association, *supra*, appellants had protested imposition of fees upon commercial users of the Rogue River, in a recreational "special area" regulated under provisions of 43 CFR Subpart 8372. Also, in Rogue River Outfitters Association, appellants claimed, among other things, that BLM could not charge a fee to commercial users of the river when it did not charge all users a fee. The Board's decision in that case establishes that the fee there charged appellants was a use fee, based upon and authorized by provisions of section 4(c) of the Land and Water Conservation Fund

Act, 16 U.S.C. § 4601-6a (1982), and section 304 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1734 (1982), and Departmental regulations at 43 CFR Part 8372. See Rogue River Outfitters Association, *supra* at 375, 381-84. The Board concluded, *id.* at pages 386 and 387, that noncommercial users of the river should also be charged a use fee for the "specialized use" which was found to be the basis for the fee charged, *i.e.*, maintenance of toilet facilities and trash removal from the "wild and scenic" portions of the river traversed by noncommercial users.

Following the Rogue River Outfitters Association decision, appellant indicated in correspondence to BLM that appellant construed the language in the Rogue River Outfitters Association opinion to mean that commercial and private user fees must "be equal" and must "be equally borne by commercial and private users" (Letters dated June 3, 1982, Jensen to BLM Oregon State Director and Jensen to Lawton, Exhs. 1, 2, Appellant's Statement of Reasons). BLM disputed this analysis, and responded that the user fees collected were not required to be equally apportioned between the two types of users (Letter dated July 7, 1982, Vetterick to Jensen, Exh. 7, Appellant's Statement of Reasons). BLM also indicated that the fees collected were designed to recover the costs of issuing, monitoring, and enforcing the permits rather than to obtain complete cost recovery for policing and maintenance of the Rogue River as asserted by appellant (Letters of June 24, and July 7, 1982, from Vetterick to Jensen, Exhs. 5, 7, Appellant's Statement of Reasons). The thrust of appellant's arguments on appeal is a contention that commercial users have unfairly been required to bear the entire burden to pay for maintenance of the recreational use of the river.

On April 4, 1983, appellant requested that BLM (1) impose identical fees upon commercial and noncommercial river users in 1983 or (2) reduce the 1982 commercial river user fees by 50 percent. On May 3, 1983, BLM denied both requests. On appeal to this Board, 1/ appellant seeks an order suspending commercial user fee collection until noncommercial users are also charged fees in accordance with the decision in Rogue River Outfitters Association, and an order that BLM refund all commercial fees collected after the date of that decision. Appellant argues that this result is required upon constitutional grounds, on the theory that the regulations requiring payment of fees have not been equally applied to commercial and noncommercial users alike. Appellant argues that "Constitutional rights, such as equal protection of the laws may not be denied after adjudication on the basis of inability to coordinate with a co-equal branch of government" (Appellant's Reply Memorandum at 2). The reference to a "co-equal branch" is an allusion to BLM's explanation of the administration of the permitting system on the Rogue River.

BLM's answer to appellant's statement of reasons sets out facts concerning the administration of the permit system for the Rogue River recreation activities which are undisputed by appellant. Thus, concerning the

1/ BLM seeks an order dismissing this appeal for failure to timely file notice of appeal. Since there is nothing in the record to show the date when appellant received the decision appealed from, there is no basis upon which to grant such a motion. See 43 CFR 4.411(a).

administration of the wild and scenic river program on the Rogue River, BLM explains:

[T]he agency has not yet implemented fees for noncommercial use of the special recreation area. This lack of implementation of such a charge is due to the fact that there are two separate systems for issuance of permits for use of the Rogue River. In one system, the BLM issues commercial use permits. In the other system, the Forest Service issues noncommercial use permits. Each agency issues permits for the entire reach of the river which is administered as a special recreational area, even though portions of that reach are under the separate control of the BLM or the Forest Service. In order for the BLM to charge fees to noncommercial users, it would be necessary either to obtain the concurrence of the Forest Service or to set up a new and separate permit system for that portion of the river which passes through BLM lands. This latter approach would result in two permits being required by noncommercial users, with the attendant duplication and inconvenience to the user and an increased opportunity for error resulting from the necessary coordination between the BLM and the Forest Service in the issuance of multiple noncommercial permits.

BLM has been working with the Forest Service to develop a coordinated plan for the charging of fees to noncommercial users. The Forest Service has been reviewing its authority to charge such fees. It is anticipated that the Forest Service will be able to implement plans so that fees can be charged in fiscal 1984. Meanwhile, the Oregon State Office, BLM, was instructed by the Washington Office, BLM, to delay implementation of proposed fiscal year 1983 recreation fee increases, including those to noncommercial users, in order to provide additional time for coordination efforts.

(Answer at 1, 2).

It appears that the total number of the river use permits is equally allocated between commercial and noncommercial users. During certain seasons, every person desiring to float through the scenic portion of the Rogue River is required to have a permit. Half the permits issue to commercial users and the remaining half issue to noncommercial users. The cost of maintaining sanitary facilities within the scenic area, however, is not sustained by the users. BLM explains this circumstance as follows:

[T]he program cost for administration of the Rogue Wild and Scenic River by BLM is approximately \$256,635 per year. This includes about \$50,000 simply for maintenance of chemical toilets, which are cleaned twice a week and from which the effluent is lifted out by helicopter. It does not include the cost of acquisition of scenic easements and other interests to preserve the environment of the river.

The BLM charged commercial users of the river fees totaling \$8,925 for fiscal year 1982. Of this, 39 per cent was forwarded

to the Forest Service for partial compensation of its costs of enforcement of the program, and 61 per cent, or \$5,444.25, was retained by the BLM. However, BLM's costs of administering the commercial use permit program totaled \$10,726. This is \$5,282 more than the BLM received in fees from the commercial users. It does not include any costs of administering the noncommercial permit system or the maintenance of the scenic qualities of the river, and no money collected from commercial users has been devoted to payment of any costs caused by noncommercial users.

(Answer at 3). By reason of the circumstances outlined by BLM's answer to appellant, the agency concludes the relief demanded by appellant is without a basis in fact, since, whether noncommercial users are charged or not, the scenic river excursions cost BLM far in excess of the fees collected from the commercial users, whose payments are unrelated to noncommercial activity on the river.

[1] Appellant may not demand refund or forgiveness of user fees on the theory that provisions of the Fourteenth Amendment entitle it to avoid payment because the Government has been lax in collecting similar fees from other users. This Board has often observed, in cases where similar arguments have been raised concerning tardy or lax enforcement of Departmental regulations, that a legal obligation cannot be vitiated by delayed or uneven enforcement of the obligation by officials of the Department. See, e.g., Lone Star Steel Co., 79 IBLA 345 (1984).

[2] Here, valid regulations of the Department require payment of certain fees by commercial boaters on a designated portion of the Rogue River. 43 CFR 8372.4; Rogue River Outfitters Association, supra at 383-85. While noncommercial users are also required to pay fees for use of the river, the regulation does not require those fees to be the same as the fees charged to the commercial user. See 43 CFR 8372.4(b)(3); Rogue River Outfitters Association, supra at 386. Further, delay in implementation of the user fee for noncommercial users does not affect the requirement that commercial users pay the fees required by regulation. The provision of 43 CFR 8372.4 requiring payment of commercial user fees is a duly promulgated Departmental regulation which must be applied by the Board while the rule remains in effect. Cf. Sam P. Jones, 71 IBLA 42 (1983).

BLM's answer indicates enforcement of the rule respecting payment by noncommercial permit holders was expected to occur in the 1984 summer season. Whether the charges were imposed or not, appellant's obligation to pay under the regulation is an established legal obligation which cannot be excused by the failure of others to make payment. Payment of the commercial user's fee is unaffected by delay in enforcement of the noncommercial users fee. 2/

2/ The record indicates BLM is attempting to begin collection of user fees from all persons who are required to pay fees pursuant to 43 CFR 8372.4. The Board assumes that collection of fees from the entire user public will soon be implemented, if such collection is not already taking place. No opinion is expressed, therefore, concerning the situation where BLM might refuse to enforce its regulations regarding fee payment as to some users while continuing to collect from others.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

R. W. Mullen
Administrative Judge